



POLICE DEPARTMENT

July 20, 2011

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Jose Acevedo
Tax Registry No. 932234
Police Service Area 7
Disciplinary Case Nos. 84153/08 & 84734/08

The above-named member of the Department appeared before the Court on March 21, 2011, charged with the following:

Disciplinary Case No. 84153/08

1. Said Police Officer, Jose Acevedo, assigned to PSA #7, while on-duty, on or about 1304 hours on May 4, 2007, in the holding cell area of PSA #7, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said officer made comments to female individuals known to the Department regarding their sexual orientation, including, "If you're really lesbian, why don't you kiss her?" "Fake lesbians." And, "She don't want your penis."

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

2. Said Police Officer, Jose Acevedo, assigned as indicated in Specification Number One (1), at the time, date, and location indicated in Specification Number One (1), did engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said officer made comments to a male individual known to the Department regarding his sexual orientation, including, "You the only one that looks like you take stuff up the ass."

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS

Disciplinary Case No. 84734/08

1. Said Police Officer Jose Acevedo, while assigned to PSA #7, while off-duty, on or about December 1, 2007, at a location known to the Department in Yonkers, New York, Westchester County, did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer wrongfully, and without just cause, participated in a verbal dispute that escalated to a physical dispute with an individual known to the Department.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT – PROHIBITED CONDUCT

2. Said Police Officer Jose Acevedo, while assigned to PSA #7, while off-duty, on or about December 1, 2007, at a location known to the Department in Yonkers, New York, Westchester County, failed and neglected to immediately notify the Department after being involved in a domestic incident which necessitated the response of law enforcement.

P.G. 212-32, Paragraph 2 – OFF-DUTY INCIDENTS INVOLVING UNIFORMED
MEMBERS OF THE SERVICE

The Department was represented by Adam Sheldon, Esq., Department Advocate's Office.

Respondent was represented by John Tynan, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty as charged.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department submitted statements by Person A, Person B, Person C and Person D in connection with the CCRB investigation. The Department called Yonkers Police Department Sergeant James Ahearn and New York City Police Department Sergeant Richard Hurtle as witnesses in the domestic matter.

Original Phone Complaint to CCRB (Department's Exhibit [DX] 5, recording; DX 5a, transcript)

On May 4, 2007, Person A and Person C filed CCRB complaints by telephone. Person A told the CCRB operator that earlier that day he had been taken into custody after failing to comply with orders to clear the area near a school. While in the cell area of the Police Service Area (PSA) 7 station house, Respondent made unnecessary comments about the way that Person A was dressed. Respondent asked him, "Did you miss the F train to Prince Street . . . trying to say like don't you belong in the Village" (i.e., that Person A was gay). When Person A said, "[W]hy are you making a smart comment? . . . [I]f I was going to make a smart comment towards you, like officers like you, . . . you all would take it up the ass. You all would take it serious." Respondent replied, "Well, you're the one that's looking like you're taking it up the ass. That's the way you're looking."

According to Person A, Respondent also made comments about the girls in another cell. Respondent told one girl (Person C) to kiss another girl. He told Person A to stop speaking to Person C because she "don't like [Person A's] penis."

Person C was 17 years old and also spoke to the CCRB operator. She stated that she was she was in a cell with a girl who was dressed in men's clothes. This other girl, Person C said,

was gay. Respondent wanted to see the two girls kiss and told the other girl that if she were gay, she should kiss Person C.

CCRB Interview of Person B (see DX 6, recording; DX 6a, transcript)

On May 15, 2007, Person B, who was 17 years old, gave an interview to a CCRB investigator. She stated that while in the cells at PSA 7, a police officer harassed Person A. The officer told Person A that "he looks like he doesn't belong here, he needs to go back to the Village, that he was like gay." The officer went on to harass Person B and the other young woman in the cell, telling her and Person B to make out with each other, "like to show him that we're gay." When Person A and Person C were speaking to each other, the officer told Person A, "[O]h she don't like you. She don't like your penis."

CCRB Interview of Person C (see DX 7, recording; DX 7a, transcript)

On May 15, 2007, Person C was interviewed by a CCRB investigator. Person C stated that while she, Person A and Person B were in the cells at PSA 7, Respondent made inappropriate comments while watching them. Respondent asked Person A why he was dressed the way he was, and told him that he had missed the train to the Village. Person B "dresses like a guy," and Respondent told her, "[O]h, you're really a lesbian" and that Person C should kiss her. He told Person B and Person C that they were "fake lesbians," and that if they were really lesbians they would kiss each other.¹ Moreover, every time that Person A spoke to Person C, Respondent would tell him, "[O]h, shut up, don't speak to her. She doesn't like your penis."

¹ Although the transcript reads "freak" lesbians, the recording reveals that Person C said "fake" lesbians.

CCRB Interview of Person A (see DX 8, recording; DX 8a, transcript)

On May 15, 2007, 20-year-old Person A gave an interview to a CCRB investigator.

Person A stated that while Respondent watched him in the PSA 7 cells, the officer, "like from the way [Person A] was dressed," said, "[E]xcuse me, did you miss the F train to Prince Street or something?" He was wearing fitted jeans, a blazer and vest with a T-shirt underneath it, sneakers, and a hat. Person A replied that if he were to "make comments" toward an officer like Respondent, "you would all take it up the ass." Respondent replied that Person A was "the only one that looks like he would take stuff up the ass." Person A stated that "everybody was like oh in the room . . . it was like everyone went ooh, like you know, basically instigating because it was like everybody was thrown back." Person A's cousin, Person D, was going to say something back, but Person A told him not to.

Turning to Person B, who was "dressed like a boy," Respondent stated that if she were really a lesbian she should kiss Person C. Person A yelled to Person C to remember what Respondent was saying. Respondent told Person A to "be quiet, she don't want to talk to you. She don't like your penis."

Person A noted that these comments by Respondent were not made "back to back." He would leave the cell area and "would say something again . . . like he had an angst against me or something."

Person A said to Respondent that he could "keep on with those comments." Respondent answered, "[O]h, what you going to do here? You ain't gonna do shit." Person A replied, "I ain't gonna do shit I ain't nobody," to which Respondent said, "[E]xactly."

Person A noted that there was another male prisoner in the cell with him. He had been there for awhile and was talking to the cops like they were all friends. "I guess that's what made the cops feel like they could talk to us like that."

Interview of Person D (see DX 9, recording; DX 9a, transcript)

On May 15, 2007, 16-year-old Person D gave an interview to a CCRB investigator. Person D stated that he was in the same cell as his cousin, Person A. There was an officer there that "was bored I guess. He was like hey I'm a comedian," and started making jokes. The officer said to Person A, "Mr. F train to Prince Street." Person A said "something about if I was to make comments about a cop, y'all would take it up the butt."²

Respondent also made comments to the female prisoners. He said to Person B (who was in fact bisexual) that if she were gay, she should kiss another of the females. When Person A told Person C to "remember the conversation," Respondent told him, "[D]on't talk to her. She don't like your penis."

Person D believed that Respondent was trying to be funny. Person D thought it was funny but Person A did not. He could not see Person B and Person C, but did not hear them laughing.

Yonkers Police Department Sergeant James Ahearn

Ahearn had been a member of the Yonkers Police Department (YPD) for 16 years. While working as the patrol supervisor on December 1, 2007, he responded to Respondent's residence. There, Yonkers Police Officer Mannocci informed him that Respondent's girlfriend, Person E, had complained about getting hit by Respondent during the course of an altercation. Ahearn spoke to Person E, who told him that Respondent slapped her and grabbed

² This, and not "that would take me up the butt," is the correct transcription of the recording.

her neck, which prompted her to call the police. Person E also told Ahearn that Respondent had left and came back when responding officers arrived.

When Ahearn arrived at the apartment, Person E was sitting in a chair and had the couple's infant sitting in her lap. She had some redness to the right side of her face and her neck, consistent with someone who had been involved in a physical altercation. Person E refused medical attention and stated that she no longer felt in fear for her safety. On the supporting deposition page of the Domestic Incident Report (DX 1), Person E wrote that Respondent slapped and choked her during an argument (see also DX 2, YPD complaint report).

Respondent was not arrested. Ahearn contended that this incident was not a mandatory arrest situation because Person E indicated that she did not want to press charges, and did not claim she had been assaulted by Respondent, but only that there had been a physical altercation.

After speaking with Person E, Ahearn spoke with Respondent in the hallway, informing him that it was Respondent's responsibility to notify the New York City Police Department (NYPD) of the domestic incident. Respondent was calm. At no point did Respondent deny to Ahearn that a physical altercation had occurred between him and Person E.

Three 911 calls were admitted as DX 3. On the first call, the operator answered, but there was no response from the caller. A male voice can be heard in the background, yelling, in sum and substance, "Are you going to take everything that we own?" (this was said in Spanish). The second call was either a 911 callback or another 911 call that did not result in conversation. On the third call, Person E spoke to the operator and stated that Respondent hit her. She was crying during the call.

On cross-examination, Ahearn acknowledged that Respondent did not appear to be a threat to responding officers and that Person E was "calm and collected" when he spoke to her.

On re-direct examination, Ahearn added that Person E appeared "upset", but not "violent" or "enraged." The redness on Person E's neck was consistent with someone who had been slapped and grabbed about the neck area.

On re-cross-examination, Ahearn clarified that Person E was not "screaming" or "shouting" in the apartment, but nevertheless seemed "nervous and disturbed by what had gone on." He could not tell if Person E had been crying, but she might have been because her eyes were a little red. Ahearn could not recall whether or not Person E's face was "flushed" or red.

Ahearn acknowledged that he could not see the outline of fingers on Person E's neck. He stated that he observed a scratch mark on her neck.

Upon questioning by the Court, Ahearn stated that the scratch mark was about two inches in length. This was what he referred to as the redness.

Sergeant Richard Hurtle

Hurtle was assigned to Housing Bureau Investigations and conducted the investigation of the December 1, 2007, incident. He testified that the Department became aware of the incident after Respondent called the Operations Unit. Although the incident occurred at approximately 11:30 a.m., Respondent did not notify the Department until 3:54 p.m. Hurtle explained that a delay of reporting an incident typically affects investigations because evidence could disappear or be manipulated, and complainants could change their stories. In Respondent's case, investigators did not go to see Person E until approximately 9:00 p.m. At that point, Person E recanted her allegations against Respondent, and Respondent denied that anything had taken place. Furthermore, by that time, although YPD officers had seen a mark on Person E's neck, "the mark was no longer there."

Mannocci, the YPD police officer, was interviewed. She stated that Person E had a mark on her neck.

On cross-examination, Hurtle admitted that he was not aware that Respondent contacted his union delegate to find out what he should do shortly after the police left his residence. Hurtle's testimony that Respondent did not call the Operations Unit until 3:54 p.m. was based on a '49' prepared by the duty captain on the day of the incident. What the '49' specifically said, however, was that at approximately 3:54 p.m., Operations notified the duty captain that Respondent had been involved in a domestic incident.³

When questioned on the night of the incident, Person E stated that "it never happened."

Respondent's Case

The Respondent testified on his own behalf.

Respondent

Respondent was assigned to PSA 7. On May 4, 2007, he was at the station house when another police officer asked him to escort a prisoner to the bathroom. When Respondent went back to the holding cell area, he observed what appeared to be a male and a female prisoner in the cell hugging and kissing. The prisoner he thought was male had cornrowed hair, and was wearing baggy jeans and a backwards hat. Respondent said, "[W]hat are you two guys doing? What are you guys as in male and female doing there? You guys cannot be together in there."

In response, one of the individuals whom Respondent had mistaken for a male became very irate. She took off her hat and said that she and the other female prisoner were lesbians.

³ The Advocate stated that documents showing exactly when Respondent actually called Operations are no longer extant.

Respondent tried to apologize, saying, "I didn't realize you were both girls." Respondent believed that Person A, a prisoner in the adjacent male cell, took this the wrong way. He asked Respondent if he "had a problem with gay people." Respondent replied that he did not, but Person A became irate, "basically saying that I'm gay too." Person A stated that he knew "plenty of cops who love to take it up the ass." Respondent replied, "I don't know what you do on your own time, but don't bother me with it." He denied that this meant that Person A was gay. Respondent "meant other than if you are going to be cursing and saying stuff over there, you keep doing it and say whatever you have to say. You are already there. Leave me out." Respondent contended that this "had nothing to do with any sexual conduct [Person A] was engaging in." Respondent did not tell Person A, "[Y]ou're the one that looks like he likes to take it up the ass."

Person A was still angry, saying that Respondent did not like gay people. Respondent denied that he tried to get the two female prisoners to kiss, told them to show him they were really lesbians, or said they were "fake lesbians." He did not say to the female prisoner who he had first believed was male, "[S]he don't want your penis." He did not "accuse [Person A] of being a homosexual." When asked if he "accuse[d] Person A of involving himself in anal sex or having gay sex," Respondent answered, "He was the one who threw out the gay sex and the gay comments towards me."

Respondent testified that he and Person E were getting married the weekend after the trial. In December 2007, he considered Person E to be [REDACTED] They had a child that was three or four months old in December 2007. Respondent testified that at approximately 11:30 a.m. on December 1, 2007, he was off-duty and at home when he got into an argument with Person E concerning his sister. Person E was upset that his sister was buying expensive gifts

for their daughter. Person E was irate and became physical toward him. While he was sitting in bed, Person E put her hands on him and pushed him. Respondent pushed Person E out of the way because she was blocking him from exiting the bedroom. Respondent wanted to leave the apartment because he had always been taught to walk away from such situations. He neither slapped nor scratched Person E. When Person E tried to stop him from leaving, he moved her out of the way a second time and then left. Respondent described Person E as very upset, "very physical," and very loud.

Respondent testified that he went out to the parking lot to get some air. Approximately five minutes later, he saw members of the YPD arrive. He immediately returned to his apartment and identified himself to the police officers present at the location by showing them his shield and Department identification card. When the YPD officers left approximately ten minutes later, Respondent went to his mother's house in the Bronx. It was approximately 12:30 p.m. at that point.

When Respondent arrived at his mother's house approximately a half hour later, he called his union delegate to tell him about the incident that had just occurred. The delegate told him to stand by so that he could figure out exactly what to do. Approximately 45 to 60 minutes later, the delegate called Respondent back and gave him the telephone number to Operations. Respondent called Operations at some point between 2:00 and 2:30 p.m. Respondent testified that he saw Person E later that day. He did not observe any injuries on her and she did not complain of any.

On cross-examination, Respondent testified that during the holding-cell incident, he was calm the entire time Person A was "screaming" at him and never cursed at him or used insulting remarks. Respondent denied saying anything about taking the F train to Prince Street. He

asserted that although he grew up [REDACTED], he was unfamiliar with the subway because he went to a local school and his father had a car. He claimed not to know that Greenwich Village was a center of the gay and lesbian community.

Respondent contended that Person A "threatened" him, saying, "[Y]ou don't know who I know. I will make complaints against you. I know the number to CCRB." He understood this not to mean threats of violence though. Respondent recalled, however, stating in his CCRB interview that Person A "didn't say he was going to make a complaint against me. The only words that he said when I was trying to talk to the lady [i.e., Person B], he's like, don't say nothing to that nigger right there. We got something for him. Let me talk to you outside."

Respondent testified when that when Person E first called 911 during the December 2007 incident, he told her not to call anyone. "She was basically saying I'm going to mess you up . . . make false statements . . . do everything I can to make you lose your job." When she first called 911, she hung up the phone. Respondent then left.

Respondent spoke with Mannocci at the scene and characterized Person E as the aggressor in the incident.

FINDINGS AND ANALYSIS

Disciplinary Case No. 84153/08

Respondent is charged with making inappropriate statements regarding the sexual orientation of several prisoners that were in the PSA 7 holding cells. There actually are large areas of agreement as to what took place. Only certain parts of the event are in dispute.

Respondent was present in the cells, as were four prisoners: Person A, Person C, Person B, and Person D (the Court will refer to them collectively as “the complainants,” although it was Person A and Person C that actually contacted CCRB). The Department portrayed Respondent as joking around with the prisoners and fellow officers. He looked at Person A, who was wearing a blazer, vest, fitted jeans and sneakers, and asked him, in sum and substance, if he “missed the F train to Prince Street.” It was understood by Person A and several of the other prisoners (although the F train does not stop at Prince Street and Prince Street is in SoHo) that Respondent was insinuating that Person A belonged in Greenwich Village, i.e., that he was gay. An offended Person A retorted that if were to make comments like that toward certain officers, they would take it very seriously: in Person A’s words, they would “take it up the ass.” In response, Respondent said that Person A was “the only one that looks like you take stuff up the ass.” This is Specification No. 2.

The Department asserted that Respondent then moved on to two female prisoners in another cell, Person C and Person B. The latter was dressed in male clothing. According to the Department, Respondent said that Person B was a lesbian and that Person C should kiss her. Apparently disappointed, he then told Person B and Person C that they were “fake lesbians,” and that if they were really lesbians they would kiss each other. Person A called out to Person C from the adjacent cell and told her to remember what Respondent was saying, i.e., to make a complaint about it later. Respondent, in sum and substance, told Person A not to talk to Person C because “she don’t want your penis.” This is Specification No. 1.

According to Respondent, the chronology went a little differently. He was in the holding cell area to escort a prisoner to the bathroom. In one cell, he saw what appeared to be a male and female prisoner hugging, if not kissing. He told them that they could not be in the same cell

together. One of the prisoners took off her hat and revealed that she was, in fact, female and that they were lesbians. Respondent apologized, but Person A called out from the other cell, asking him if he had a problem with gay people. Respondent denied this, but Person A continued, telling him that he knew "plenty of cops who love to take it up the ass." Respondent replied, "I don't know what you do on your own time, but don't bother me with it."

The Department's case relies in large part upon the hearsay statements of Person A, Person C, Person B and Person D. While Respondent corroborated much of the incident, he portrayed his remarks as innocuous. Although hearsay is admissible in this forum, see Matter of Ayala v. Ward, 170 A.D.2d 235 (1st Dept. 1991), there are significant reasons for caution in cases like this that present close questions of credibility. Cf. *Case No. 77005/01*, signed May 27, 2002. The four CCRB witnesses did not appear for trial. In light of their failure to testify, the Court cannot observe their demeanor, explore possible motives to lie, or assess the credibility of their accounts after the test of cross-examination.

This does not change the fact, however, that hearsay is admissible in this forum if it is sufficiently relevant and probative. See People ex rel. Vega v. Smith, 66 N.Y.2d 130, 139 (1985); Matter of Grossman v. Kralik, 217 A.D.2d 625, 626 (2d Dept. 1995); cf. Matter of Andruszkiewicz v. Doherty, A.D.3d ___, 923 N.Y.S.2d 466 (1st Dept., May 17, 2011) (testimony of Sanitation Department investigator, who obtained hearsay statement from woman that gave gratuity to employee for accepting trade waste, was sufficiently relevant and probative to demonstrate that employee accepted the gratuity). The Court notes that the four accounts were consistent with each other, although not to the point that one would have to believe they were concocted. For example, the alleged comment about Respondent missing the train to downtown Manhattan was described in various ways. Person A described the events as confrontational,

whereas his cousin, Person D, portrayed Respondent as acting in a comedic manner. Even Person A described his fellow prisoners as reacting jocularly when Respondent told him he was the one that looked like he took stuff up the ass.

One factor in assessing credibility of the four complainants is whether there was a motive to fabricate. No lawsuit was filed in this case. According to the Department, the complainants were “arrested for truancy” (it was unclear from their statements exactly why they were in custody). From the outset, there was never a complaint by them about being placed in custody or who placed them into custody. They complained only about the comments allegedly made by Respondent. There was no evidence that the complainants had any other bias against police officers in general. In fact, they spoke positively of other officers with whom they interacted, and negatively of others as well. In short, there was no evidence of any motive on the complainants’ part to fabricate. Of course, as the accused, Respondent was an interested witness as a matter of law.

In terms of bias of the complainants, Respondent asserted that Person A was angry with him from the outset. Respondent contended that he confronted the female prisoners legitimately and as part of his police duty, and apologized when he realized that they were both female. Yet Person A was “irate” at this. If Respondent’s version is accurate, though, Person A had nothing to be mad about because he did not reference the sexual orientation of the prisoners. Respondent did not, according to his own account, say that two female prisoners were not allowed to kiss each other, but that a male and female prisoner were not allowed to be in the same cell.

On the other hand, Person A’s account was internally consistent and unembellished. He admitted that he was upset with Respondent, but he stated that it was Respondent that started the problem by implying that he was gay. Person A retorted with a vulgar metaphor, that if he were to

make smart comments toward officers, they would “take it up the ass.” Respondent answered back that Person A was the one that looked like he took it up the ass. In the Court’s view, Person A’s version is the more credible version of events. Whether Respondent thought Person A meant this term sexually, or in the metaphor Person A explained to the CCRB investigators, Respondent’s retort was inappropriate.

Respondent is also charged with making comments about Person B and Person C. The complainants asserted that he tried to get these two female prisoners to kiss and said that they were fake lesbians. One of them was wearing male clothing. When Person A tried to intervene, Respondent told him that she did not “want your penis.” Respondent, again, gave a similar account, but said that he saw what appeared to be a male and female kissing. Upon trying to separate them, the two female prisoners said that they were lesbians.

In assessing credibility of the complainants versus Respondent, the Court notes that according to Respondent, he was confronted with a violation of police procedure, one that went directly to the safety of prisoners. He observed a male and female prisoner in the same cell, hugging and kissing. He did not testify whether there was a cell attendant present, but it would appear that there was not, if a male and female prisoner were engaging in that conduct in one cell. Yet when Respondent was apprized of this, he did not inform a supervisor or ask for assistance in resolving the situation. Instead, he made a “comment” about it, in his words. Respondent’s characterization of what he said as a “comment” was a strange way of describing his conduct if it were taken legitimately and as part of his police duty. It indicates to the Court that he did more than make an innocent observation that the prisoners could not be in the same cell together.

Again, the complainants' accounts were unembellished. They were consistent with each other but not to a point that suggested collusion. It is undisputed that Respondent saw what appeared to be a male and female prisoner, but what were actually two females. It is also undisputed that Person B was, in fact, either bisexual or a lesbian. In this light, the Court credits the Department's assertions that Respondent made comments indicating that he wanted to see these two female prisoners kiss and that he called them "fake lesbians" when this did not occur. In light of the Court's crediting of the complainants' accounts, the Court also credits the Department's claim that when Person A told Person C to remember what was going on, Respondent told Person A that she didn't "want his penis."

Accordingly, the Court finds Respondent Guilty of the charges against him in Case No. 84153/08.

Disciplinary Case No. 84734/08

Respondent is charged in this case with "participat[ing] in a verbal dispute that escalated to a physical dispute with" Person E, with whom he had a child in common. This is Specification No. 1. He is also charged, pursuant to Patrol Guide § 212-32, para. 2, with failing "to immediately notify the Department after being involved in a domestic incident which necessitated the response of law enforcement." This is Specification No. 2.

The incident began around 11:30 a.m. on December 1, 2007, when Person E made a series of 911 calls from the residence in Yonkers she shared with Respondent and their child. In tears, she stated that Respondent "hit" her. Yonkers police responded to the scene. Person E stated that Respondent had slapped and choked her. YPD observed redness on the side of Person E's face.

YPD also was informed that Respondent was a member of the New York City Police Department. He was not arrested.

According to Respondent, he got into an argument with Person E about expensive gifts his sister was buying for their daughter. He described her as the aggressor. She pushed him and blocked his path, so he pushed her in order to leave. He first went to his mother's house, then called his delegate to find out what he should do. The delegate called back with the number to Operations "and basically told me what to go about from this point on." It was approximately 2:00 to 2:30 p.m. when Respondent actually called Operations.

A complete assessment of credibility is not necessary for a determination on Specification No. 1 because Respondent's own testimony established that he "wrongfully, and without just cause, participated in a verbal dispute that escalated to a physical dispute with" Person E. He admitted that when she pushed him and stood in his way, he pushed her out of the way. This was not justified. It was certainly not an assault under the Penal Law because there was no evidence of physical injury, but that does not detract from the fact that it was a physical altercation that he undertook. See Case No. 84562/08, signed Sept. 1, 2009 (by physically blocking his girlfriend from leaving the room, member created a physical confrontation, regardless of whether he grabbed her arms; her brother pushed member, and member pushed him back).

Accordingly, the Court finds Respondent Guilty of Specification No. 1.

In the second specification, Respondent is charged, pursuant to Patrol Guide § 212-32, with failing "immediately" to notify the Operations Unit that he had been involved in a domestic incident, to which the YPD responded, with Person E. It was as many as three hours later that he did so. The cited Patrol Guide procedure actually requires that members "promptly" inform the

Department of off-duty incidents. However, by citing the correct procedure in the specification, the Department sufficiently notified Respondent of what he was being charged with: failing to promptly notify the Department. Cf. *Case Nos. 77032/01 & 77243/01*, signed Dec. 23, 2002 (member was charged under P.G. § 208-37 with failing to "immediately" notify Department of unusual police occurrence and pleaded guilty in a mitigation hearing; the procedure states that member must "notify" Department if remaining at scene of unusual police occurrence is not feasible).

Respondent knew that Person E was calling 911. He also saw the YPD arrive, and spoke to them, identifying himself as an NYPD member. He then went to his mother's house and called his delegate. Only after his delegate got back to him, after as much as an hour, did Respondent call Operations.

This gap in time constituted a failure to notify Operations promptly. The Court is mindful of the fact that Respondent appears to have taken some time to decide the proper course of action. However, Respondent had the responsibility to know that he was required to make the call as soon as reasonably possible. He could have done so while YPD was there, or after they left, but instead he left for his mother's house. This was not "prompt" within the meaning of the rule. Accordingly, the Court finds Respondent Guilty of Specification No. 2.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on July 1, 2003. Information from his personnel folder that was

considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found Guilty of making remarks, which he found amusing, about the perceived sexual orientation of several truants that were being held at the station house of PSA 7. He has also been found Guilty of becoming involved in a physical altercation with a domestic partner, and failing to report that incident promptly to the Department. The local police observed redness on the complainant's face or neck. Once the Department reached the complainant, however, no redness was observed, and she recanted the allegation. Respondent, however, admitted in his testimony that he pushed her during the incident.

Based on precedent, the Court recommends a penalty of the forfeiture of 15 vacation days. See, e.g., Case No. 77348/01, signed May 5, 2003 (5 days for calling hostile suspect "maricon," a derogatory Spanish term for homosexual); Case No. 86193/10, signed June 9, 2011 (10 days for spitting on husband after he did so to her first, and failing to report that and prior incidents promptly). This case is distinguishable from others involving sexually-tinged remarks in which the complainant taunted the member or instigated the incident. Cf. Case No. 77440/01, signed Oct. 7, 2003 (member warned and admonished for telling lesbian prisoner, who had unbuttoned her pants and told member he looked like a dick and was a dickhead, that she "doesn't like dick"). Respondent started this entire affair by commenting on his perception of Person A's appearance.

APPROVED
JUN 19 2012
Raymond W. Kelly
RAYMOND W. KELLY
POLICE COMMISSIONER

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner – Trials

**POLICE DEPARTMENT
CITY OF NEW YORK**

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER JOSE ACEVEDO
TAX REGISTRY NO. 932234
DISCIPLINARY CASE NOS. 84153/08 & 84734/08

Respondent received an overall rating of 4.0 “Highly Competent” on his last three annual performance evaluations. He has been awarded one medal for Excellent Police Duty. [REDACTED]

In 2007, Respondent went to trial on charges of wrongful use of force and was found Not Guilty. From May 2008 to May 2009, Respondent was placed on Level-I Force Monitoring. Based on his overall record, Respondent was placed on Level-II Discipline Monitoring in May 2009.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner Trials